

**IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS CLAIMS**

Vet. App. No. 16-80

FRANKIE MCFADDEN,

Appellant

vs.

ROBERT A. MCDONALD
Secretary of Veterans Affairs
Appellee

On Appeal From the Board of Veterans' Appeals

Reply Brief of the Appellant Frankie McFadden

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Reply Brief of the Appellant Frankie McFadden

The Board relied on a “presumption of regularity” to deny credibility to the veteran’s statement and to a buddy statement. The evidence in the case failed to show that there was a regular and consistent procedure of recording events such as the departure of a mail plane from the ship in the deck logs, and the only evidence from the military on the question indicated that this type of information would likely not be recorded in the deck logs. There was no evidence establishing a regular procedure, and thus no presumption of regularity arose.

The Secretary argues that the presumption of regularity has not been rebutted. However, the Secretary fails to cite to any actual evidence that demonstrates a regular procedure giving rise to such a presumption.

Mr. McFadden further argued that the only evidence against his claim was the erroneous finding by the Board that there was an unrebutted “presumption of regularity,” one that established that his departure from the ship would have been recorded in the deck logs.

The Secretary argues that there was evidence supporting the Board’s finding of the existence of a presumption of regularity, and thus that neither remand nor reversal is appropriate.

ARGUMENT

The Board’s adverse finding of material fact that Mr. McFadden did not set foot in the Republic of Vietnam was clearly erroneous.

I. The Board’s reliance on a presumption of regularity was not based in fact.

Whether a presumption of regularity attaches to the public actions of a public official is a question of law to be determined by the Court *de novo*. *Marsh v. Nicholson*, 19 Vet.App.381, 386 (2005). The Court must determine whether there is a “regular and established VA practice to which the presumption of regularity may be applied.” *Kyhn v. Shinseki*, 24 Vet.App.228, 233-234 (2011). This principle should similarly apply to the actions of military officials.

In this specific case, the Board member sought to apply a presumption of regularity to the actions of military officials, stating that the deck logs would have included information about Mr. McFadden leaving the USS *America* on a small mail plane. R.8 (R.1-16). As discussed in Mr. McFadden's opening brief, Appellant's Opening Brief (AB) at 7-10, there is no evidence to support this assumption. In fact, the actual evidence indicates that the deck logs would likely not have contained this information.

The Secretary's argument relies on misstatements about the facts and about the arguments made by Mr. McFadden in his opening brief. The Secretary argues that Mr. McFadden stated that "the delay of a mail plane" would not have been recorded, Secretary's Brief (SB) at 9, and that Mr. McFadden asserted that he took a mail plane "during heavy rocket fire," an event which would not be routine, and thus would have been recorded in the deck logs. SB.11-12.

There was, however, no assertion by Mr. McFadden or in the record, stating that the mail plane was delayed leaving the ship or that he took a mail plane during heavy rocket fire. Mr. McFadden, to the contrary, discussed the delay of a plane from Da Nang to the Philippines:

The Board member also asserted that the fact of a plane being delayed leaving Da Nang would have been so significant as to surely have been included in the deck logs. R.9 (R.1-16). However, there is no basis for this assertion, not even logic and common sense. There is nothing in the record to indicate that a

ship's deck logs would record information regarding flights from Da Nang to the Philippines, and no apparent reason that this sort of activity in Da Nang would be recorded in a ship's deck logs. *The delay of a flight from the ship itself would likely be a significant event that would be recorded, but the flight in question was not such a flight. It was a flight from Da Nang to the Philippines*, and it is unlikely that every ship in the coastal waters would note in its deck log all flight activities from Da Nang.

AB at 8 (emphasis added).

Similarly, there was no assertion that Mr. McFadden took a mail plane "during heavy rocket fire." SB. at 11-12. There was no indication that there was any rocket fire during the mail plane trip from the ship to Da Nang – rather, the evidence shows that there was heavy rocket fire in Da Nang during the following days, and that this prevented any planes from leaving Da Nang for the Philippines. R.272 (R.269-272).

The Secretary's argument relies on these misstatements to establish that the actions were not "routine" and thus would surely have been included in the deck logs. In addition to the misstatements, this argument also relies upon an assumption by the Secretary as to what would have been recorded, an assumption that is not supported by any evidence in the record.

The actual evidence in the case indicates that there is no regular procedure of including in the deck logs names of personnel coming and going from the ship, and that the deck logs "may" indicate planes or boats coming or going, but would not include destinations. R.670. Clearly, it is not a regular and established practice to include records of a small mail

plane flying to Da Nang or to record the name of any personnel on such flights, according to the information from military officials.

The Secretary asserts that the DPRIS statement establishes that “[i]t is clear from the evidence of the record that the Navy documents flight operations and documents whether ships docked or personnel went ashore. (R. at 22, 670).” There is nothing in the DPRIS statements at R.22 and R.670 that indicate that Mr. McFadden’s flight on a small mail plane would routinely have been documented. The question of whether the ship docked or personnel went ashore is completely irrelevant in this case, since there is no assertion made that the ship docked or that Mr. McFadden went ashore in this circumstance.

The Secretary also fails to discuss the Board’s other asserted basis for the presumption of regularity, that the records (presumably, the ship’s deck logs) are presumed to have been accurate “pursuant to duties to record accurately the events and assessments pertaining to military disciplinary proceedings.” R.8 (R.1-16). However, there were no military disciplinary proceedings in this case. Mr. McFadden’s record of discharge indicates that he received an honorable discharge, due to a “Reduction in Authorized Strength,” R.130 (R.108-165), and that he was recommended for reenlistment. R.133 (R.108-165). Therefore, the Board’s finding of a presumption of regularity is based upon inaccurate facts.

It is clear from Mr. McFadden's official records that he left the USS *America* on January 25, 1973. R.131 (R.108-165). However, there appears to be nothing at all in the deck logs that indicates his departure, by any means. If the deck logs could be presumed to necessarily discuss his departure on a small mail plane, surely they would have discussed his departure in some other fashion. The fact that there is no such information in the record shows that there was no "regular and established practice" of noting the departure of servicemen from the ship.

The Secretary has failed discuss any evidence that establishes the existence of a regular procedure, such that a presumption of regularity arises. The only actual evidence indicates that there was no such regular practice and the Secretary has not pointed to any evidence to the contrary. Without such a regular practice, there can be no presumption of regularity, a presumption based on the assumption that government officials will comply with the regular practices that have been established. Since the presumption of regularity did not arise in this case, there is no burden on the veteran to "rebut" it.

II. The Board's adverse finding of material fact should be reversed.

This Court has the authority to reverse a finding of material fact adverse to the appellant that is clearly erroneous. 38 U.S.C. § 7261(a)(4). The Court of Appeals for the Federal Circuit has noted that "where the

Board has performed the necessary fact-finding and explicitly weighed the evidence, the Court of Appeals for Veterans Claims should reverse when, on the entire evidence, it is left with the definite and firm conviction that a mistake has been committed.” *DeLoach v. Shinseki*, 704 F.3d 1370, 1380 (Fed.Cir.2013), citing *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 92 L.Ed.746 (1948). See also *Romanowsky v. Shinseki*, 26 Vet.App.289, 295 (2013).

Reversal is appropriate when the record permits only one view of the evidence. *Pullman-Standard v. Swini*, 456 U.S. 273, 292, 102 S.Ct. 1781, 72 L.Ed.2d 66, (1982); *Pacheco v. Shinseki*, 26 Vet.App.413, 418 (2014); *Gutierrez v. Principi*, 19 Vet.App. 1, 10 (2004).

As discussed in Mr. McFadden’s opening brief, there is no evidence contradicting his lay statements explaining his presence in the Republic of Vietnam except the Board’s erroneous finding that the evidence in his favor is contradicted by a “presumption of regularity.” AB.11-13. There is, however, lay evidence that Mr. McFadden did in fact “set foot in” Vietnam. R.23 (R.23-25), R.326-332 (R.321-337). There is circumstantial evidence that supports his account of his departure from the USS *America* on a small mail plane and then being delayed in Da Nang because of heavy rocket fire. Indeed, the Board itself noted that a small mail plane would be unable to travel as far as the United States, R.6 (R.1-16), thus suggesting that the destination of the small mail plane was closer at hand.

Official records show that Mr. McFadden was transferred from the USS *America* on January 25, 1973, for separation. R.131 (R.108-165). Clearly, he left the ship in some way, and there is no documentation of his having left it in any other way.

In this case, the Board has stated that no further factual development would be appropriate, since the case “must be evaluated based on the current evidence of record.” R.6 (R.1-16). The Board has explicitly weighed the evidence, making a finding that the statements of Mr. McFadden and Mr. Lewis are “simply not factually accurate.” R.9 (R.1-16). This finding is based on nothing more than the Board member’s determination that there is a “presumption of regularity,” a finding that is not supported by the actual evidence.

The lay statements of Mr. McFadden and Mr. Lewis, R.23 (R.23-25), R.184 (R.180-185), are consistent with the objective evidence in the case, particularly the official evidence showing that Mr. McFadden did leave the USS *America* on January 25, 1973. R.131 (R.108-165). The Board determined that their statements were “not credible,” based only on this unsupported presumption of regularity.

Since the Board’s finding is contrary to the actual evidence of record, it is clearly erroneous. This is not a case of “weighing the evidence,” because there is no evidence in the record to support the Board’s finding.

All of the evidence supports a finding that Mr. McFadden was in fact in the Republic of Vietnam for several days, and therefore the Board's finding to the contrary is clearly erroneous and should be reversed by this Court.

III. If the Board's finding of material fact is not reversed, the Court should vacate the decision and remand the case so that the Board can provide adequate reasons and bases for its decision.

It is indisputable that the Board is to make determinations of the credibility of the veteran's statements. However, any finding that the veteran's testimony is not credible must be supported by an adequate statement of the reasons and bases for that finding. *Cartwright v. Derwinski*, 2 Vet. App. 24, 26 (1991). 38 U.S.C. § 7104(a) requires the Board to base its decision on consideration of "all evidence and material of record." The Board must analyze the credibility and probative value of the evidence, account for the evidence that it finds to be persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Gabrielson v. Brown*, 7 Vet.App. 36 (1994).

In this case, the only basis for the Board's denial of credibility to Mr. McFadden's statement was its invocation of a presumption of regularity. As has already been discussed, there was in this case no evidence that there was a regular practice such that Mr. McFadden's departure from the USS *America* would have been documented. Furthermore, despite the Board's statement that the records would have included all events

pertaining to military disciplinary proceedings, R.8 (R.1-16), there were no such disciplinary proceedings.

Therefore, if the Board's finding of material fact is not reversed, the case should be remanded so that the Board can explain what basis exists to determine that there were regular procedures that would support the existence of a presumption of regularity.

CONCLUSION AND RELIEF REQUESTED

For the reasons and upon the authorities cited above and in his opening brief, Mr. McFadden respectfully requests this Court to reverse the Board's finding of material fact that he did not set foot in Vietnam, and that he is therefore not entitled to the presumption of Agent Orange exposure.

In the alternative, Mr. McFadden requests the Court to vacate the Board's decision and remand this case so that the Board can provide adequate reasons and bases for its conclusion that a presumption of regularity applies and can discuss the evidence tending to corroborate Mr. McFadden's lay evidence.

Respectfully submitted,

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